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Conflict of Laws—Torts—California

By JAMES B. SCHNAKE* and JAMES MURAD**

IT WAS just a quarter of a century ago that Justice Cardozo wrote words which now seem hopelessly dated:

Fields there are in the domain of law where fundamental conceptions have been developed to their uttermost conclusions by the organon of logic. One finds this method of decision in much of the law of bills and notes. . . . [and] again in the law of real estate One finds it again in one of the most baffling subjects of legal science, the so-called *Conflict of Law*. We deal there with the application of law in space. The walls of the compartments must be firm, the lines of demarcation plain, or there will be overlappings and encroachments with incongruities and clashes. In such circumstances, the finality of the rule is in itself a jural end. I do not mean that even in this sphere the judge who seeks to reach the heart of a concept, its inmost implications, may not find, when he has gained the core, that the concept is one with policy and justice. . . . I find logic to have been more remorseless here, more blind to final causes, than it has been in other fields. Very likely it has been too remorseless.¹

It is not our intention to discuss on a theoretical basis the development of torts conflict of laws in California over the last forty-five years. It is our intention to ascertain whether the California courts are still locked in the Ice Age thinking of the first *Restatement*, or whether this State is moving forward boldly, intelligently, and with some sensitivity to the need to do justice in the particular case.

We have seen in the past decade landmark cases such as *Grant v. McAuliffe*,² *Emery v. Emery*,³ and *Bernkrant v. Fowler*,⁴ in which the California Supreme Court, and more particularly Justice Traynor, took great leaps forward in reaching sound decisions not only from the standpoint of the litigants before the court, but also from the standpoint of an intelligent development of choice of laws in multi-state transactions. However, we have also seen regrettable lapses and backward steps. In the egregiously erroneous decision of *Victor v.*

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¹ CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 67-68 (1928).

² 41 Cal. 2d 859, 264 P.2d 944 (1953).

³ 45 Cal. 2d 421, 289 P.2d 218 (1955).

⁴ 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961).

*Sperry*⁵ (where the California Supreme Court unaccountably refused to hear the case), no violation of the public policy of this State was found in limiting a California plaintiff negligently injured by a California defendant to a preposterously small measure of damages under the law of Mexico where the accident fortuitously occurred. Similarly, *Wilson v. Lockheed Aircraft Corp.*⁶ left little to be admired in its bland assumption that a three month time limitation on a widow's right to bring a wrongful death action in an air crash was not violative of California public policy.⁷ The issue we think the practicing lawyer is most likely to have presented to him, and which we will attempt to discuss, is not what the California courts have done in the past, but what they will do when confronted with some of the more obvious problems in multi-state tort cases, and in particular, those involving automobile accidents outside the boundaries of California.

Californians are without a doubt the most peripatetic people in the world. Daily, they cross and recross state boundaries in pursuit of business and pleasure. It is not surprising, therefore, that the automobile has played a substantial role in formulating both the California and contemporary choice of laws rules.

If you were to ask the average practitioner in this State what law would govern a tort case with multi-state elements, the inevitable reply would be the law of the place of wrong.⁸ The first *Restatement*⁹

⁵ 163 Cal. App. 2d 518, 329 P.2d 728 (1958), *petition for hearing denied*, 163 Cal. App. 2d at 526, 329 P.2d at 733 (1958).

⁶ 210 Cal. App. 2d 451, 26 Cal. Rptr. 626 (1962).

⁷ The *Wilson* decision might well be explained by the apparent absence of any substantial connection between California and the place of the crash (Texas) or the injured parties. The case is disturbing nonetheless in its failure to see a problem along these lines.

⁸ E.g., *Emery v. Emery*, 45 Cal. 2d 421, 289 P.2d 218 (1955); *Grant v. McAuliffe*, 41 Cal. 2d 859, 862, 264 P.2d 944, 946 (1953) (dictum); *Loranger v. Nadeau*, 215 Cal. 362, 366, 10 P.2d 63, 65 (1932). But cf. the following in which the conflicts problem was ignored, *Layne v. Kirby*, 208 Cal. 694, 284 Pac. 441 (1930); *Draper v. Hellman Commercial Trust & Sav. Bank*, 203 Cal. 26, 263 Pac. 240 (1928); *Montgomery v. McLaury*, 143 Cal. 83, 76 Pac. 964 (1904).

⁹ RESTATEMENT, CONFLICT OF LAWS (1934):

§ 377. THE PLACE OF WRONG.

The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place.

§ 378. LAW GOVERNING PLAINTIFF'S INJURY.

The law of the place of wrong determines whether a person has sustained a legal injury.

§ 379. LAW GOVERNING LIABILITY-CREATING CONDUCT.

Except as stated in § 382 [Duty or Privilege to Act], the law of the place of wrong determines

(a) whether a person is responsible for harm he has caused only if he intended it,

offered this easy solution to practically all questions, and not just the basic problem of the rules of the road. Almost from its promulgation, the *Restatement* rule of choice of laws has been circumvented, villified, attacked, and held up to ridicule. In case after case the courts have been forced to engraft exceptions in order to do substantial justice, and on those occasions when a court has followed the strict letter of the *Restatement* rule, the result has been criticized as unjust and unrealistic. It is not surprising, therefore, that a strong force should assert itself in the California Supreme Court calling for a re-analysis and re-examination of the premises of the "standard" choice of laws rule. Justice Traynor's departure from the *Restatement* rule in *Grant v. McAuliffe* and *Emery v. Emery* has been fully discussed elsewhere¹⁰ and need not be re-examined here. Suffice it to say that the *Grant* rejection of the harsh Arizona rule which precluded the survival of tort causes of action, and the *Emery* application of the law of the domicile to govern the question of intra-family tort immunity, have made sensible and necessary departures from the *Restatement* rule of *lex loci delicti*.

Let us now consider whether or not the California court would utilize the same approach of *adjudication* as distinguished from *automation* in handling questions of wrongful death damage limitations, owner's responsibility, and guest status. All three problems may be fitted into a not-too-factually-complex hypothetical case.

Don and his wife, Donna, residents of California, invited their neighbors, Peter and Paula, to go with them to the New York World's Fair. Although they shared expenses with Don and Donna, it is clear that under California law, and probably the law of most other states, Peter and Paula were simply social guests. Donna owned the car and had considerable other property, whereas Don had only modest means. Donna's automobile liability policy provided that coverage was limited to the United States. On the way back from the World's Fair the couples stopped in Buffalo, New York, where Don and Donna had too much to drink. Leaving Donna asleep at a motel on the American side,

(b) whether a person is responsible for unintended harm he has caused only if he was negligent,

(c) whether a person is responsible for harm he has caused irrespective of his intention or the care which he has exercised.

¹⁰ See, e.g., 1957 CAL. LAW REVISION COMM'N RECOMMENDATION & STUDY RELATING TO CHOICE OF LAW GOVERNING SURVIVAL OF ACTIONS J-7; Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205 (1958); Sumner, *Choice of Law Governing Survival of Actions*, 9 HASTINGS L.J. 128 (1958); Note, 68 HARV. L. REV. 1260 (1955); Note, 29 N.Y.U.L. REV. 1288 (1954); Note, 27 So. CAL. L. REV. 468 (1954); Note, 1 U.C.L.A.L. REV. 380 (1954).

Don drove Peter and Paula to Canada where an accident caused by his drunken misbehavior proved fatal to all three.

In the suit brought in California on behalf of the children of Peter and Paula against Donna and Don's estate, at last three choice of law problems are readily apparent. First, are the plaintiffs barred by the Draconian Guest Statute of Ontario which prohibits recovery against a host where no compensation is paid? Second, assuming that Ontario limits wrongful death damages to 30,000 dollars, shall Ontario or California law govern the measure of damages? Third, may Donna seek refuge from vicarious responsibility under the doctrine of *Scheer v. Rockne Motors Corp.*¹¹ since Don had been expressly admonished not to take the car to Canada? Would Donna be immune in spite of the fact that California, New York, and Ontario all provide for owner's responsibility?

Guest Statutes and *Lex Loci Delicti*

Whether the guest statute of the place of wrong or the law of the domicile of the parties and the place of creation of relationship should apply, would seem to be answered by reference to the oft-cited case of *Loranger v. Nadeau*¹² which held that the law of the place of wrong would be applied in preference to California's guest statute. There the court did not even deign to discuss the fact that at least one of the parties was domiciled in California and that other significant factors connected California to the transaction, but held that the universal rule was to apply the *lex loci delicti*. The only problem which concerned the California Supreme Court was whether or not the public policy of this State would be offended by the application of the foreign rule as to duty of care. However, in spite of the fact that *Loranger* has been cited and followed by other California courts,¹³ we submit that the current court would not follow *Loranger*, but instead would adopt at least the result and perhaps the reasoning of the landmark case of *Babcock v. Jackson*.¹⁴

¹¹ 68 F.2d 942 (2d Cir. 1934). See also *Victor v. Sperry*, 163 Cal. App. 2d 518, 329 P.2d 728 (1958).

¹² 215 Cal. 362, 10 P.2d 63 (1932); cf. *Emery v. Emery*, 45 Cal. 2d 421, 289 P.2d 218 (1955); *Grant v. McAuliffe*, 41 Cal. 2d 859, 264 P.2d 944 (1953); *Victor v. Sperry*, *supra* note 11.

¹³ *Emery v. Emery*, *supra* note 12; *Grant v. McAuliffe*, *supra* note 12; *Victor v. Sperry*, *supra* note 11.

¹⁴ 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963). *Babcock* has attracted a flurry of law review commentaries and promises to be a favorite of case book authors and jurists for some time to come. See, e.g., Cavers, Cheatham, Currie, Ehrenzweig, Leflar & Reese, *Comments on Babcock v. Jackson, a Recent Development in*

In *Babcock* the New York Court of Appeals refused to apply the Ontario guest statute since both plaintiff and defendant were domiciliaries of New York and the relationship was created in that state. The only connecting factor with Ontario was the fortuitous occurrence of the accident there. Judge Fuld rejected out of hand *Restatement of Conflict of Laws*, section 384.¹⁵

It [the first *Restatement's* rule of *lex loci delicti*] had its conceptual foundation in the vested rights doctrine, namely, that a right to recover for a foreign tort owes its creation to the law of the jurisdiction where the injury occurred and depends for its existence and extent solely on such law. . . . [T]he vested rights doctrine has long since been discredited More particularly, as applied to torts, the theory ignores the interest which jurisdictions other than that where the tort occurred may have in the resolution of particular issues. It is for this very reason that, despite the advantages of certainty, ease of application and predictability which it affords . . . there has in recent years been increasing criticism of the traditional rule by commentators and a judicial trend towards its abandonment or modification.¹⁶

The theoretical basis for the decision in *Babcock* was that a "center of gravity" or "grouping of contacts" doctrine was more palatable than the territorialistic vested rights theory of the *Restatement* rule. The court stated:

Comparison of the relative "contacts" and "interests" of New York and Ontario in this litigation, vis-à-vis the issue here presented, makes it clear that the concern of New York is unquestionably the greater and more direct and that the interest of Ontario is at best minimal. The present action involves injuries sustained by a New York guest as the result of the negligence of a New York host in the operation of an automobile, garaged, licensed and undoubtedly insured in New York, in the course of a week-end journey which began and was to end there. In sharp contrast, Ontario's sole relationship with the occurrence is the purely adventitious circumstance that the accident occurred there.¹⁷

Would *Babcock* be followed by the California Supreme Court, requiring, as it must, the overruling *sub silentio* of *Loranger v. Nadeau*

Conflict of Laws, 63 COLUM. L. REV. 1212 (1963); Currie, *Conflict, Crisis and Confusion in N.Y.*, 1963 DUKE L.J. 1.

¹⁵ RESTATEMENT, CONFLICT OF LAWS (1934):

§ 384. RECOGNITION OF FOREIGN CAUSE OF ACTION.

(1) If a cause of action in tort is created at the place of wrong, a cause of action will be recognized in other states.

(2) If no cause of action is created at the place of wrong, no recovery in tort can be had in any other state.

¹⁶ 12 N.Y.2d at 477-78, 191 N.E.2d at 281, 240 N.Y.S.2d at 746-47 (1963).

¹⁷ *Id.* at 482, 191 N.E.2d at 284, 240 N.Y.S.2d at 750.

and all its progeny? Actually *Loranger* can be distinguished since the facts were somewhat different. In *Loranger* the plaintiff was a resident of one of the provinces of Canada and the relationship of guest and host arose there rather than California (the accident occurred in Oklahoma). Thus the larger number of contacts were not in California. On the other hand the purely *significant* contacts were in California. The defendant lived here, undoubtedly he garaged his car here, and perhaps, most important, he purchased his insurance in California from a company which based its rates in large part upon California experience.

It must be assumed that Justice Traynor or others who might be writing a majority opinion would hold that *Loranger* was no longer representative of contemporary thinking. We believe that *Loranger* would be overruled as archaic, mechanistic conflict of laws thinking from another era. Obviously Ontario has no substantial governmental interest in the outcome of the lawsuit at hand. If the children of Peter and Paula go unrecompensed for their loss they will become charges, not upon the Province of Ontario, but upon the State of California where they reside. California has an overwhelming governmental interest in providing not merely a forum, but also an adequate remedy for the wrong inflicted upon these children, and such interest would be held to prevail over the negligible interest of Ontario in the outcome of the litigation. Although no court has thus far so held, the unthinking application of the *lex loci delicti* might, in this case, be held to be so egregiously erroneous as to violate the due process clause.

The same result might be reached by yet another route. Professor Ehrenzweig has argued persuasively for the application of the "Foreseeable and Insurable Laws" to guest statute problems. He would not call for a grouping of contacts or an application of forum law under Professor Currie's "Restrained and Enlightened Forum" approach. Instead he would apply any law to protect the victim so long as that law was one the defendant could foresee and against which he could insure.¹⁸ Obviously Don and Donna could reasonably foresee the application of California's guest statute and could have purchased insurance (the premium would have been based upon California experience). Professor Ehrenzweig would apply California's guest statute, not because a larger number of contacts were centered there, but simply because the automobile was garaged (and was or could have been

¹⁸ EHRENZWEIG, CONFLICT OF LAWS § 220 (1962); Ehrenzweig, *Guest Statutes in the Conflict of Laws—Towards a Theory of Enterprise Liability Under "Foreseeable and Insurable Laws,"* 69 YALE L.J. 595 (1960).

insured) in California.¹⁹ Ehrenzweig's rule of "Foreseeable and Insurable Laws" appears to be a more workable alternative than the *Restatement Second's* grouping of contacts theory, since it avoids the possibility of the erroneous application of one state's law simply because a numerically larger group of contacts might appear in that state.²⁰

Now let us consider another hypothetical case which presents problems far more difficult to resolve. Assume that the accident occurred in Arizona and that the defendant was guilty of no more than ordinary negligence. In Arizona a host is responsible to his guest for a failure to exercise ordinary caution.²¹ Which rule would the California court select? Now the shoe would be on the other foot. The attorneys for the insurance carrier for Donna and Don's estate would strenuously urge that *Babcock* and indeed all of the forward-thinking decisions in this field, would militate in favor of the application of California law. Their argument would be that Arizona was totally lacking in any governmental interest in the outcome of the litigation and that the decision would be the same whether one followed the *Babcock* reasoning and grouped the contracts, or whether one followed Professor Currie's view that the forum should apply its law in the absence of a strong governmental interest in favor of the application of foreign law,²² or whether one followed the view of those who are revising the *Restatement*.²³

We might observe parenthetically that the reporters of *Restatement Second* and the cases seem to be following more the views of Justice Traynor²⁴ and the New York court in *Babcock*, than the Currie and Ehrenzweig insistence on primary use of the law of the forum. Indeed the *Babcock* court quoted with approval and relied upon language from the most recent tentative draft of *Restatement Second*.²⁵

¹⁹ See also Comment, *The Second Conflicts Restatement of Torts: A Caveat*, 51 CALIF. L. REV. 762, 782-91 (1963).

²⁰ See, e.g., *White v. Motor Vehicle Acc. Indemnification Corp.*, 39 Misc. 2d 678, 241 N.Y.S.2d 566 (Sup. Ct. 1963). See also Ehrenzweig, *The "Most Significant Relationship" in the Conflicts Law of Torts*, 28 LAW & CONTEMP. PROB. 700 (1963).

²¹ See Appendix.

²² CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* *passim* (1963); M. Traynor, *Conflict of Laws: Professor Currie's Restrained and Enlightened Forum*, 49 CALIF. L. REV. 845 (1961). See also note 40 *infra* and accompanying text; Hill, *Governmental Interest and the Conflict of Laws—A Reply to Professor Currie*, 27 U. CHI. L. REV. 463 (1960).

²³ RESTATEMENT (SECOND), *CONFLICT OF LAWS* (TENT. DRAFT NO. 8, 1963). See also the symposium *New Trends in the Conflict of Laws*, 28 LAW & CONTEMP. PROB. 673 (1963) for evaluations of RESTATEMENT (SECOND).

²⁴ Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657 (1959).

²⁵ 12 N.Y.2d at 482, 191 N.E.2d at 283-84, 240 N.Y.S.2d at 749-50 (1963).

The general principle concerning choice of governing law of *Restatement Second* is:

(1) The local law of the state which has the most significant relationship with the occurrence and with the parties determines their rights and liabilities in tort.

(2) Important contacts that the forum will consider in determining the state of most significant relationship include:

- (a) the place where the injury occurred,
- (b) the place where the conduct occurred,
- (c) the domicile, nationality, place of incorporation and place of business of the parties, and
- (d) the place where the relationship, if any, between the parties is centered.

(3) In determining the relative importance of the contacts, the forum will consider the issues, the character of the tort, the relevant purposes of the tort rules involved.²⁶

If the California court were to follow this principle the resulting application of California's guest statute would seem to be inevitable.

One argument to the contrary would be as follows. The California court would be free to consider not only the governmental interests of the two states in the lawsuit and the parties, but also the actual merits of the two rules under consideration. It might hold that California was lacking in a sufficiently substantial governmental interest to justify application of its guest statute to a foreign tort. Another argument, which we submit should be rejected, is that the California guest statute was never intended to have more than local application. (More of this later.)

The California court has been called upon on many occasions to state what public policy, if any, underlies this statute. The California guest law has been variously described as a measure intended to protect the vehicle owner from the claims of a hand-biting gratuitous guest,²⁷ as a measure intended to prevent fraudulent claims against the owner²⁸ or, more accurately, as a measure intended to prevent collusive claims by a host and guest on terms too friendly to one another and too unfriendly toward a defenseless insurance carrier.²⁹

²⁶ RESTATEMENT (SECOND), CONFLICT OF LAWS § 379 (TENT. DRAFT No. 8, 1963).

²⁷ Ahlgren v. Ahlgren, 185 Cal. App. 2d 216, 222, 8 Cal. Rptr. 218, 222 (1960).

²⁸ Emery v. Emery, 45 Cal. 2d 421, 432, 289 P.2d 218, 225 (1955); Weber v. Pinyan, 9 Cal. 2d 226, 229, 70 P.2d 183, 185 (1937).

²⁹ Klein v. Klein, 58 Cal. 2d 692, 694 & n.1, 376 P.2d 70, 72 & n.1, 26 Cal. Rptr. 102, 104 & n.1 (1962), where Justice Peters observed: "The contention that there may be insurance involved, and that to permit such actions in such cases will encourage collusion, fraud and perjury, is also not convincing. Such arguments should be advanced to the Legislature, and not to the courts. Where such danger has been made clear to the

This raises the question of just what a court means when using a term of such variable content as "public policy" or "fundamental public policy" in the conflict of laws sense. It could not be said with any degree of candor that California's guest statute represents public policy in the sense of fundamental ideas of abstract justice or deep-seated ideas of public morality. Indeed the supreme court of this State has expressly rejected such a possibility in *Loranger v. Nadeau*.³⁰ There the court held that the narrow and sharply defined meaning of public policy could not encompass California's guest statute. In other words, the court held that there was mere dissimilarity between the law of Oklahoma and that of California and not a collision of two important policies. This holding was in line with the leading case of *Loucks v. Standard Oil Co.*³¹ and represents the better view. On the other hand, there are cases in California that have held that *every* legislative enactment is an expression of the public policy of this State and that wherever there is a collision between the foreign law and an express statute, the foreign law must yield.³² These cases are contrary to the *Loranger* decision and would probably not be followed by the California court today.

We believe that neither Justice Traynor nor any of the other judges writing on conflict of laws in California would hold that California's guest statute was an expression of substantial public policy. The California Supreme Court on more than one occasion in recent years has rejected the policy of preventing fraud where it was urged as a justification for the retaining of a rule of exemption of an entire class of defendants. In *Klein v. Klein* the court expressly rejected this argument,³³ and in *Emery* refused to utilize such a rationale for a proposed rule of intra-family tort immunity.³⁴

Legislature it has not been slow to act. (n.l. Thus the Legislature enacted the guest law, now section 17158, Vehicle Code, abolishing causes of action by guests in an automobile against the host for simple negligence, but retaining such an action based on the intoxication or willful misconduct of the host.)"

³⁰ 215 Cal. 363, 10 P.2d 63 (1932).

³¹ 224 N.Y. 99, 120 N.E. 198 (1918).

³² *Wallan v. Rankin*, 173 F.2d 488 (9th Cir. 1949); *Anderson v. Hearst Publishing Co.*, 120 F. Supp. 850 (S.D. Cal. 1954); *Ryan v. North Alaska Salmon Co.*, 153 Cal. 438, 95 Pac. 862 (1908); *Thome v. Macken*, 58 Cal. App. 2d 76, 136 P.2d 116 (1943); *McManus v. Red Salmon Co.*, 37 Cal. App. 133, 137-38, 173 Pac. 1112, 1114 (1918) (dictum). See also *Hudson v. Von Hamm*, 85 Cal. App. 323, 259 Pac. 374 (1927), criticized sharply by Traynor, *supra* note 24, at 670-71.

³³ 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962); see note 29 *supra*.

³⁴ Cf. *State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal. 2d 330, 338, 240 P.2d 282, 286 (1952). But cf. *Amaya v. Home Ice, Fuel & Supply Co.*, 59 Cal. 2d 295, 310-11, 379 P.2d 513, 522-23 (1963) (fraudulent claims a factor to consider in rejecting a rule of liability for negligently inflicted emotional stress).

Assuming that the California court was forced to conclude that the State of Arizona had no governmental interests, and that all of the factors of connection were centered in California, and that at least some policy consideration justified the legislative rule of immunity, we must consider whether the California court would be free to *adjudicate* the particular controversy before it, or whether it would feel compelled to establish a rule of choice of laws for all cases involving similar connective factors. In other words, would the court attempt to work out a proper law of the tort?³⁵

The better assumption is that the court would refuse to find itself bound by a categorical imperative and would adjudicate the case at hand. The court would probably then conclude that since there was no likelihood of collusion between the executor of Don's estate and Donna on the one hand, and the children of Peter and Paula on the other, the California rule need not be applied. If the court decided that it wanted to apply California law, it might well utilize the thinking of Justice Traynor in the landmark case of *Bernkrant v. Fowler*.³⁶ The court there held that the foreign rule was the better one because it would protect the justified expectations of the parties even though there were many substantial contacts with California and there was a direct collision between the Statute of Frauds of California and that of Nevada.

Another tool the California court might feel constrained to use is the oft-cited maxim that legislation is *prima facie* territorially limited in its scope.³⁷ It is conceded that such a ruling would be more in keeping with the vested rights thinking criticized by Justice Traynor in his recent pronouncements in the field, than it would be in line with the writings of Professor Currie and other bright lights in the new conflict of laws spectrum. Nonetheless, we would be more inclined to expect the sympathetic appeal generated in favor of the innocent children of Peter and Paula to prevail. We cannot ignore the fact that the supreme court of this State is unquestionably a plaintiff-oriented court, particularly with the resignation of some of the more conservative older judges and the appointment of such liberal justices as Justices Peters and Tobriner.

³⁵ See Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959 (1952); Morris, *The Proper Law of a Tort*, 64 HARV. L. REV. 881 (1951).

³⁶ 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961), 49 CALIF. L. REV. 962.

³⁷ *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909); *Ryan v. North Alaska Salmon Co.*, 153 Cal. 438, 95 Pac. 862 (1908); *Gordon v. Reynolds*, 187 Cal. App. 2d 472, 10 Cal. Rptr. 73 (1960) (wrongful death statute not applied to a death on the high seas).

There is yet another argument which might incline the court to favor the plaintiffs in the hypothetical case. In *Babcock* the choice was between a rule granting absolute immunity to the defendant and one at the opposite pole imposing liability for ordinary negligence. In the case at hand the choice would not be so simple. It could well be argued that the court would be called upon to choose between two only slightly different rules of duty of care. Neither the Arizona rule nor the California rule grants an absolute immunity to the host. The difference between the two statutes is that in California the host need only refrain from willful misconduct or drunk driving, whereas in Arizona he must refrain from ordinary negligence. There is language in the *Babcock* opinion to support the argument that if the choice is between two rules of duty of care, the law of place of wrong rather than that of the domicile of the parties should be utilized.³⁸ In this connection it is interesting to note that in *Emery* Justice Traynor was presented with an opportunity to reject the law of place of wrong in choosing between the guest statutes of California and Idaho. He chose the law of the place of wrong rather than the law of the domicile, citing *Loranger v. Nadeau* as authority.³⁹

On the other hand we must not ignore the fact that Justice Traynor favors the approach of Professor Currie. Under Currie's view the case would be decided by the application of forum law, not because the forum happens to have more dominant interest, not because a grouping of contacts would result in the application of California law, but simply because that state was the forum and had a legitimate governmental interest. Professor Currie has expressed his views of choice of laws as follows:

1. When a court is asked to apply the law of a foreign state different from the law of the forum, it should inquire into the policies expressed in the respective laws, and into the circumstances in which it is reasonable for the respective states to assert an interest in the application of those policies. In making these determinations the court should employ the ordinary processes of construction and interpretation.

2. If the court finds that one state has an interest in the application of its policy in the circumstances of the case and the other has none, it should apply the law of the only interested state.

3. If the court finds an apparent conflict between the interests of the two states it should reconsider. A more moderate and re-

³⁸ 12 N.Y.2d at 484, 191 N.E.2d at 285, 240 N.Y.S.2d at 752.

³⁹ In fairness it must be noted that *Emery* did not present a true conflicts problem. There was no difference between the laws of Idaho and of California. Thus it was unnecessary for the court to make any choice.

strained interpretation of the policy or interest of one state or the other may avoid conflict.

4. If, upon reconsideration, the court finds that a conflict between the legitimate interest of the two states is unavoidable, it should apply the law of the forum.

5. If the forum is disinterested, but an unavoidable conflict exists between the interests of two other states, and the court cannot with justice decline to adjudicate the case, it should apply the law of the forum, at least if that law corresponds with the law of one of the other states. Alternatively, the court might decide the case by a candid exercise of legislative discretion, resolving the conflict as it believes it would be resolved by a supreme legislative body having power to determine which interest should be required to yield.

6. The conflict of interest between states will result in different dispositions of the same problem, depending on where the action is brought. If with respect to a particular problem this appears seriously to infringe a strong national interest in uniformity of decision, the court should not attempt to improvise a solution sacrificing the legitimate interest of its own state, but should leave to Congress, exercising its powers under the full faith and credit clause, the determination of which interest shall be required to yield.⁴⁰

Although the Supreme Court of California might decide this case on the basis of Currie's point two, or point four (either that California had an interest in the application of its law and that Arizona had none, or that there was a conflict of the legitimate interests of the two states) we are constrained to believe that it would not so rule. Essentially the problem would be one of adjudicating a particular case and doing justice to the parties before the court, and the court would probably decide in favor of the plaintiffs and then, perhaps reasoning back from the result to the rationale, explain its decision on one of the bases discussed above.

Wrongful Death Limitations—Will California Adopt *Kilberg* and *Pearson*?

The second question posed by our hypothetical case is whether a California court would feel obliged to apply a foreign law limiting wrongful death damages. The solution to this problem will not be found in earlier cases which seem to follow the *lex loci delicti* rule but in the much-discussed cases of *Kilberg v. Northeast Airlines, Inc.*⁴¹ and *Pearson v. Northeast Airlines, Inc.*⁴² In both *Pearson* and *Kilberg*

⁴⁰ CHEATHAM, GRISWOLD, REESE & ROSENBERG, CASES ON CONFLICT OF LAWS 477-78 (5th ed. 1964).

⁴¹ 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

⁴² 309 F.2d 553 (2d Cir. 1962), *cert. denied*, 372 U.S. 912 (1963). See Currie,

(which happen to involve the same accident) New York residents had purchased tickets in New York City for a flight which ended short of the Boston Airport. The plaintiff in *Kilberg* sought to recover damages on a theory of breach of contract which would avoid the 15,000 dollar wrongful death limitation of Massachusetts. The majority of the New York Court of Appeals rejected the plaintiff's contract theory, but held that the plaintiff could recover full damages under the law of New York despite Massachusetts' attempt to limit damages. The New York Court of Appeals placed the decision, in part at least, on a characterization of wrongful death limitations as procedural rather than substantive. This untenable basis for a sound decision was abandoned in the later case of *Davenport v. Webb*.⁴³ Thus, the *Kilberg* decision now stands for the naked proposition that a wrongful death limitation found to be contrary to the public policy of the forum will be rejected, at least where the plaintiff and the decedent were residents of the forum state and where there are other significant contacts in the forum.⁴⁴

Pearson specifically held that the wrongful death limitation of Massachusetts would not be applied by a federal court sitting in New York and rejected the argument that *Kilberg* failed to comply with the full faith and credit clause. Judge Kaufman's extensive and well-thought-out decision in *Pearson* better explains the result in both cases than does the *Kilberg* language. The more reasonable prognostication is that California will follow the *Kilberg-Pearson* rule when the problem is squarely presented in this State.

It must be conceded that California, unlike New York, has no constitutional provision prohibiting limitations of wrongful death damages. Furthermore, the California courts have held that mere differences between the statutory rule of the forum and that of the foreign state are not sufficient justification for the rejection of the foreign law. Only where the foreign rule would be so repugnant to California policy as to "violate some fundamental principal of justice, some prevalent concept of good morals, some deep-rooted tradition of the common weal" must the foreign law be refused application.⁴⁵

Conflict, Crisis and Confusion in N.Y., 1963 DUKE L.J. 1; Comment, 61 COLUM. L. REV. 1497 (1961); Comment, 36 N.Y.U.L. REV. 723 (1961); Note, 49 CALIF. L. REV. 187 (1961); Note, 46 CORNELL L.Q. 637 (1961); Note, 74 HARV. L. REV. 1652 (1961); Note, 10 U.C.L.A.L. REV. 670, 674 (1963); Note, 47 VA. L. REV. 692 (1961).

⁴³ 11 N.Y.2d 392, 183 N.E.2d 902, 230 N.Y.S.2d 17 (1962).

⁴⁴ But see *Gore v. Northeast Airlines Inc.*, 222 F. Supp. 50, 53 (S.D.N.Y. 1963) (dictum that California would probably not follow *Kilberg*).

⁴⁵ *Loranger v. Nadeau*, 215 Cal. 362, 366, 10 P.2d 63, 65 (1932) (quoting *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 111, 120 N.E. 198, 202 (1918)); accord, *Rubin v.*

Nonetheless, we believe that the California court would hold that this State's wrongful death statute expresses public policy of a fundamental nature, and that this statute, together with the policy expressed by the Civil Code maxim that for every wrong there is a remedy⁴⁶ requires that a full recovery be awarded to the children of Peter and Paula.⁴⁷

There are several other avenues by which the California court might reach the *Kilberg-Pearson* result. The court might reject the *lex loci delicti* rule and, using the "grouping of contacts" test of the *Restatement Second*, select California law because of the preponderance of significant contacts in this State. To do so the court would have to overrule the *Gordon v. Reynolds*⁴⁸ holding that the wrongful death statute of California would not apply to an accident on the high seas, as well as the many cases giving at least lip service to the *lex loci* rule.

Another approach would be that of Currie's "Restrained and Enlightened Forum" whereby the forum would resolve the conflict by holding that the forum's interest must dominate,⁴⁹ since the forum has a legitimate governmental interest in the application of its rule.

In short, we believe that whatever the theoretical basis for the decision, California would reach the result in the *Kilberg* and *Pearson* cases.

Owner's Responsibility—*Scheer v. Rockne Motors* v. Common Sense

The third question facing the California court would be whether it would apply the owner's responsibility statute of Ontario, New York, California, or no statute whatsoever. The argument on behalf of Donna would be that she never consented to the application of Ontario law and thus it would be unconstitutional to subject her to that owner's responsibility statute. This was the holding in *Scheer v. Rockne Motors*.⁵⁰ *Victor v. Sperry*⁵¹ is in accordance with *Scheer*, although distinguishable on its facts.⁵²

Schupp, 127 F.2d 625 (9th Cir. 1942); *Hutchinson v. Hutchinson*, 48 Cal. App. 2d 12, 119 P.2d 214 (1941).

⁴⁶ CAL. CIV. CODE § 3523.

⁴⁷ Cases cited note 32 *supra*.

⁴⁸ 187 Cal. App. 2d 472, 10 Cal. Rptr. 73 (1960).

⁴⁹ Currie, *supra* note 22; M. Traynor, *supra* note 22.

⁵⁰ 68 F.2d 942 (2d Cir. 1934).

⁵¹ 163 Cal. App. 2d 518, 329 P.2d 728 (1958).

⁵² See Ehrenzweig, *Guest Statutes in the Conflict of Laws—Toward a Theory of*

In *Scheer* it was held that the law of the place of wrong could not be applied to owner's responsibility unless it could be proved that the New York owner had expressly authorized the driver to take the car out of New York and to Ontario (this in spite of the fact that the local law of both New York and Ontario imposed liability for the torts of a permissive user). Thus, the Second Circuit refused to apply the *lex loci delicti* unless the owner could be shown to have willingly submitted thereto and, more important, refused to apply the other law which might have been used to fill the gap.⁵³ Evidently the court felt that the New York owner's responsibility statute could have no extraterritorial application; it was either the law of the place of wrong or no law whatsoever.

Victor reached a similar result although it did not involve the question of submission to the law of another state. In *Victor* the accident involved three California parties: the plaintiff, the tortfeasor, and the owner. Mexico was the locus of the accident. The District Court of Appeals held that the Mexican law of owner's responsibility which did not require proof of culpability on the part of the tortfeasor could not apply because it was contrary to the public policy of this State. As in *Scheer*, the California court ignored the possible application of California's owner's responsibility statute.

These decisions might be explained on a territorialistic theory, i.e., a refusal to extend a statute beyond the boundaries of the state enacting it. Each of the two decisions was in fundamental error. If the court decides that it cannot or will not apply the *lex loci delicti*, must a gap then ensue?⁵⁴ To hold that an owner can escape responsibility for use of his vehicle where he could reasonably expect when he entrusted the car that he would be liable for an accident under the law of his own domicile is to engage in fallacious, mechanistic thinking. There is no constitutional bar to California extending the operation of its statutes beyond its boundaries, and there is no good policy reason for refusing to apply a statute when a gap would otherwise exist. The proper rule would be to apply either the owner's responsibility statute of Ontario or California, and the preferable law would

Enterprise Liability Under "Foreseeable and Insurable Laws," 69 YALE L.J. 595, 601-04 (1960).

⁵³ This submission test is inconsistent with the general rule of vicarious liability whereby an owner may be held liable where his borrower, although having consent to begin with, uses the car in a forbidden place. EHRENZWEIG, CONFLICT OF LAWS § 219 (1962); 2 HARPER & JAMES, TORTS § 26.16 (1956).

⁵⁴ See M. Traynor, *supra* note 22, at 849 n.22 ("lacuna" where policies of both states are limited to local situations).

be the one by which both parties reasonably expected to be governed, *i.e.*, the law of California.

Conclusion

In spite of the myriad cases giving lip service to *Restatement*, section 377,⁵⁵ and all the eminent writers who have defended this rule, we submit that the law of California should and will take up the pace of the rapid-moving development in the choice of laws as to torts, and break loose from the rigid rule of the law of the place of wrong. Actually California has already embarked on such a course and it requires only that the court give honest recognition to the fact that it is time to shake free the shackles of a mechanical rule which failed to give regard to legitimate state interests. As Justice Traynor concluded in his speech to the students and faculty of the University of Texas Law School in 1959:

As we now finish one long servitude to categorical imperatives, we should be on the guard against another. The law of conflicts has been kept in its infancy all too long to survive another deep freeze. It has a chance at last to develop freely. Only as progressive case law accumulates can we gain the necessary perspective for determining the areas in which conflicting state interests so chronically threaten interstate harmony as to call for federal legislation.

. . . The responsible court will have to be on its mettle. It must be prepared to reject unrealistic rules, yet cautious enough not to make formulations that reach too zealously into the future or to give too zealous a scope to local policy. It must distinguish between real and spurious conflicts at the outset. It must temper its freedom to declare local policy and its scope with a sense for harmonious interstate relations as well as for the justifiable expectations of the parties.⁵⁶

Those words should be given heed by any California lawyer faced with a choice of laws problem today.

⁵⁵ See note 9 *supra*.

⁵⁶ Traynor, *supra* note 24, at 675.

Appendix

The following tables of differing substantive tort rules illustrate the need for careful checking to determine whether a case with interstate elements does present a true or spurious conflict of laws problem. The attempt has been made to select states which would most often be involved with California plaintiffs or defendants, depending on the particular tort involved.

MOTOR VEHICLE LIABILITY STATUTES

State	Permissive Use Statute	Direct Action Statute	Guest Statute
California	Yes	No	Yes—intoxication or willful misconduct
Arizona	Yes; family car	No	No—ordinary care
Colorado	Yes; family car	No	Same as California
Illinois	No; master-servant relationship or common law agency; no family car doctrine	No	Yes—Willful and wanton misconduct
Louisiana	Doubtful	Yes	No—ordinary care
New York	Yes	No	No—ordinary care
Oregon	Yes; agency and family purpose	No	Yes—gross negligence or intoxication
Texas	No; common law liability; no family purpose	No	Yes—intoxication or recklessness
Utah	No (same as Illinois)	No	Yes—intoxication or willful misconduct
Washington	No	No	Yes—intoxication or willful, intentional misconduct

DAMAGES IN PERSONAL INJURY AND WRONGFUL DEATH ACTIONS

State	Wrongful Death Limitation on Damages	Interest as Element of Damages	Punitive Damages for Negligently Caused Injuries or Death
California	Pecuniary loss No maximum	No	No
Arizona	Fair	No	No
Illinois	Pecuniary loss Maximum \$30,000	No	No
Massachusetts	Maximum \$20,000	Yes	Yes—wrongful death
Nevada	Fair	No	No
Oregon	Maximum \$25,000	No	No
New Jersey	Pecuniary loss No maximum	No	No
Missouri	Maximum \$15,000	No	Yes
Washington	Pecuniary loss No maximum	No	No